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UNIVERSITY OF RICHMOND
LAW REVIEW

VOLUME 15 FALL 1980 NUMBER 1

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EXPLORING THE LIMITS OF *Brady v. Maryland*: CRIMINAL DISCOVERY AS A DUE PROCESS RIGHT IN ACCESS TO POLICE INVESTIGATIONS AND STATE CRIME LABORATORIES

I. INTRODUCTION

Why not criminal discovery? This question has been posited by legal scholars and learned jurists alike since the liberalization of discovery methods under the modern codes of civil procedure.[1] As inexact as the term criminal discovery may be and, according to its critics, as inapplicable as discovery may be in the criminal context,[2] there is little doubt that the current trend is the expansion of that which is discoverable by either side prior to a criminal trial.[3] In fact, criminal discovery has developed into something more than a problem of procedure to be resolved by the individual jurisdictions in piecemeal fashion. In the framework of the prosecutor's duty to disclose evidence favorable to the defense, it has achieved constitutional proportions.[4]

The United States Supreme Court in the case of *Brady v. Maryland*[5] held that the suppression of evidence which is favorable to an accused by the prosecution is a violation of due process if the evidence has been requested and if it is material to either guilt or punishment.[6] Although earlier suppression cases dealt with actual prosecutorial misconduct,[7] the Supreme Court made it clear that this duty attaches regardless of the good faith or bad faith of the prosecutor.[8] Both the dissenting opinion and a separate opinion by Justice White criticized the Court for invoking due process and preferred to decide the issue on [illegible]

1. FED. R. CIV. P. 26-37. Promulgated in 1938 and codified in Title 28 of the United States Code, the discovery rules seek to minimize surprise at trial and allow for the "full creative potential of the adversary process." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180 (1960).
2. *See, e.g.*, United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923).
3. For a discussion of the expansion of criminal discovery in West Virginia, see Note, *Criminal Procedure—Discovery—Movement Toward Full Disclosure*, 77 W. VA. L. REV. 561 (1975), which recounts the legislative and judicial actions modifying the common law rule of prohibiting criminal discovery.
4. Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437 (1972).
5. 373 U.S. 83 (1963).
6. *Id.* at 87.
7. Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).
8. 373 U.S. at 87.
9. *Id.* at 91-95 (White, J., concurring opinion; Harlan, J., dissenting). Justice White points

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Brady remains the most far-reaching case under the general heading of criminal discovery for the very reason that due process mandates disclosure.[10]

Ambiguity in the *Brady* decision led to litigation in the lower courts which attempted to bring the blurred areas of the holding into focus.[11] A subsequent Supreme Court case[12] helped to clarify analysis by recognizing three subsections to the *Brady* rule: (1) suppression by the prosecution after a request by the defense; (2) the favorable character of the evidence; and (3) the materiality of the evidence.[13] Finally, in *United States v. Agurs*,[14] the Court defined materiality and, as a practical consequence, confined *Brady* to those instances in which specific requests for favorable evidence are made by the defense. Apart from these specific request situations, the Court went on to hold that the prosecution also has a duty to disclose in situations of perjured testimony[15] and in situations when a general request is made or even when no request for favorable evidence is made, so long as the evidence itself is material.[16] Materiality was framed in terms of the finding of guilt: a finding of guilt is permissible only if supported by evidence establishing guilt beyond a reasonable doubt, and if the omission of certain evidence creates reasonable doubt that did not otherwise exist, then the evidence was material and constitutional error has occurred.[17]

Agurs may have cleared the air somewhat but was unfaithful to the spirit of *Brady* and the public policy arguments upon which it was based.[18] At the same time, *Brady* enjoys a kind of vitality within its pre-

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out that while couching the rule in terms of due process, the majority opinion by Justice Douglas cites neither the United States nor the Maryland Constitutions. He goes on to say:

> In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.

Id. at 92.

10. *See generally* Annot., 34 A.L.R.3d 16 (1970).
11. United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).
12. Moore v. Illinois, 408 U.S. 786 (1972). *See* note 59 *infra* for a discussion of this case.
13. *Id.* at 794-95.
14. 427 U.S. 97 (1976).
15. *Id.* at 103.
16. *Id.* at 107.
17. *Id.* at 112.
18. *See* notes 21 to 34 *infra* and accompanying text.

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scribed limits. Despite the limitations placed on *Brady* by *Agurs*, several recent cases[19] have extended the parameters of *Brady* to the point that it may be said that the prosecutor's duty to disclose favorable evidence begins with the investigation of the crime itself.[20] The due process requirements of *Brady* would then involve defense participation in the police investigation and access to state crime laboratory facilities. Such access would be particularly meaningful to indigents within the criminal justice system. It can be argued that denial of access to such facilities is the kind of suppression condemned by *Brady* and its lineage in that the evidence which may be favorable to the accused is never developed.

II. POLICY BEHIND *Brady*

Before examining the limits of *Brady*, it is necessary to identify the policy arguments behind the decision and to trace the evolution of the rule in the case law before and after *Brady* and *Agurs*. Although by no means concluded today, the criminal discovery controversy reached its zenith in the late 1950's and early 1960's as initial breakthroughs in the area were being made.[21] The segment of the legal community advocating reform expounded its attack in the law reviews and scholarly journals;[22] those against criminal discovery included many active judges who supported the status quo in their case opinions.[23]

Three reasons are generally offered as the traditional arguments against criminal discovery. First, under our system of criminal procedure, the accused already has every advantage, as, for example, the privilege against self-incrimination.[24] Second, criminal discovery would inevitably lead to

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19. Peoples v. Hocker, 423 F.2d 960 (9th Cir. 1970); Adams v. Stone, 378 F. Supp. 315 (N.D. Cal. 1974); Bowen v. Eyman, 324 F. Supp. 339 (D. Ariz. 1970).

20. *See generally* Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond Brady*, 53 N.Y.U.L. REV. 835 (1978) [hereinafter cited as Note, *Toward a Constitutional Right*].

21. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964) (tracing the development of criminal discovery in California).

22. Garber, *The Growth of Criminal Discovery*, 1 CRIM. L.Q. 3 (1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 CALIF. L. REV. 56 (1961); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957).

23. United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953); Commonwealth v. Wable, 382 Pa. 80, 114 A.2d 334 (1955); Flannery, *The Prosecutor's Case Against Liberal Discovery*, 33 F.R.D. 74 (1963) (part of a symposium on discovery in federal criminal cases).

24. United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923), Judge Learned Hand stated:

> Under our criminal procedure the accused has every advantage. While the prosecu-

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the manufacture of false testimony by the defense at trial and almost certain perjury by the accused if on the witness stand.[25] Finally, the accused upon learning the identity of the prosecution's witnesses might be inclined to bribe or intimidate them.[26] The result would be a system tainted by fraud and deceit in which all the advantages accrue to the defendant. The argument concludes that criminal discovery is a one-way street easily manipulated by the criminal element and eventually producing the destruction of the adversary process.[27]

The pro-discovery advocates argue that, in practice, the opposite is true since the state has most of the advantages. Their rebuttal focuses on the need for fairness and equality between the parties at trial.[28] Justice Brennan, a leading proponent of liberalized criminal discovery, wrote:

> I submit that we must rethink our opposition to allowing the accused criminal discovery, certainly if we are to continue to maintain that our system of criminal justice, if not favoring the accused, at least keeps the scales evenly balanced in his contest with the state. Are the scales really evenly balanced? Who are our criminal defendants? . . . Judges know that the largest percentage of these people are indigent.[29]

He further condemned the critics of discovery who implied by their reasoning that the accused was guilty and, as a result, had no right to complain that his counsel was being denied access to the materials which might better aid him in developing the whole truth.[30] The pro-discovery element believes the taint in the system comes from the side of the prose-

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> tion is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve . . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Id. at 649.

25. State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953).

26. *Id. But see* Louisell, *supra* note 22, at 100, where the argument is made that such intimidation is only involved in cases of organized crime or professional criminals.

27. Recently, a fourth reason for nondiscovery has been suggested: the intrusion on the prosecution's work product. For a discussion of this and an excellent overall treatment of the traditional arguments, see Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude to Abuse*, 45 MISS. L.J. 887 (1974).

28. Goldstein, *supra* note 22, at 1192: "If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position."

29. Brennan, *The Criminal Prosecution: Sporting Event or Question for Truth*, 1963 WASH. L.Q. 279, 285.

30. *Id.* at 287.

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cutor who, because of his inequal power in marshalling the resources of the state to assist him, gains the advantage and makes a fair trial impossible.[31] The harm to the defendant takes on constitutional proportions since it denies him the fairness of trial required by the fifth amendment.[32]

The *Brady* decision adopted three public policy arguments as the reasoning to support the opinion: (1) equalizing the sides should more readily create a fair trial that will arrive at the truth; (2) such fairness is an important element of the trial and (3) the ultimate conviction of the accused is not the paramount consideration.[33] In historical retrospect, *Brady* can best be viewed as part of the expansion of rights granted to the criminally accused by the Supreme Court in the 1960's and is wholly consistent with other decisions aimed at nurturing trials that are fundamentally fair.[34]

III. THE *Brady* LINEAGE

As stated earlier, the genesis of the *Brady* rule pertained to cases dealing with the conduct of the prosecution, specifically the knowing use of perjured testimony.[35] In *Mooney v. Holohan*,[36] manufactured evidence resulted in the petitioner's conviction below, prompting the Supreme Court

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31. *See* Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 143 (1964) [hereinafter cited as Note, *The Prosecutor's Constitutional Duty*]. *But cf.* United States v. Agurs, 427 U.S. 97, 112 n.20 (1976) (criticizing the above line of reasoning).

32. "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. Traynor, *supra* note 21, at 229, reasons: "The states are free to adopt their own rules of criminal procedure so long as those rules comply with the minimum requirements of fairness imposed upon the states by the due process clause of the fourteenth amendment of the United States Constitution."

33. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. *Accord*, Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962) (The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one).

34. *E.g.*, *In re* Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Frank v. Mangum, 237 U.S. 309 (1915) (Holmes, J., dissenting). "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial. . . ." *Id.* at 347. The phrase fundamental fairness was used extensively in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), and has been grafted into other areas including the *Brady* suppression opinions.

35. *See generally* Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure*, 59 IOWA L. REV. 433 (1973) [hereinafter cited as Comment, *Materiality and Defense Requests*].

36. 294 U.S. 103 (1935) (per curiam) (petitioner's habeas corpus relief denied without prejudice since no exhaustion of state remedies).

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to state:

> [due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.[37]

This line of reasoning was enlarged seven years later in *Pyle v. Kansas*[38] where, allegedly, the use of perjured testimony had been coupled with the deliberate suppression of evidence favorable to the accused. Two subsequent Supreme Court decisions held, respectively, that the prosecution, although not soliciting the falsehood, must correct such evidence when it does appear and is relevant to punishment[39] and, likewise, must correct false evidence even if it involves only the credibility of the witness.[40] In summary, the early cases ruled that a prosecutor cannot suborn perjury or allow perjured testimony to go uncorrected even as to credibility of the witness.

The stage was set for *Brady* when the federal courts began to de-emphasize the prosecutor's role and motives and to stress the unfairness to the defendant in suppressing favorable evidence. In one case,[41] the prose-

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37. *Id.* at 112. The Court refused to take a narrow view of due process just because the correct procedure had been followed.

38. 317 U.S. 213 (1942) (reversing denial of a writ of habeas corpus). The Court felt a determination should be made as to the verity of petitioner's allegations that the prosecution coerced witnesses to perjure themselves to gain a murder conviction and concluded:

> Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution. . . .

Id. at 215-16.

39. Alcorta v. Texas, 355 U.S. 28 (1957) (per curiam) (witness' testimony, known to prosecution, would have corroborated heat-of-passion defense and reduced murder conviction).

40. Napue v. Illinois, 360 U.S. 264 (1959). The witness had taken part in a robbery with petitioner and lied that he had received no consideration from the government for testifying against his former cohort. The Court held:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id. at 269. *See also* Giglio v. United States, 405 U.S. 150 (1972).

41. United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949). "Due

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cutor suppressed a hospital report which indicated the victim had not been raped. This led the court to reason that the prosecutor, "to be fair, [must] not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor."[42] In a second case,[43] a ballistics report and an examination of the fatal bullet were suppressed. If introduced, these might have reduced the death penalty imposed on the defendant. Finally, in a third case,[44] an arresting officer who thought the defendant was intoxicated at the time of arrest was not called by the prosecution. The court criticized the prosecution and refused to put the onus on the defense by hypothesizing that even the most outstanding defense lawyer could not have been held to placing the second arresting officer on the stand.[45] It is important that two of the above cases emphasized the importance of the jury's evaluation of the suppressed evidence in the context of all the circumstances rather than reliance on some pretrial determination by the government.[46] In United States *ex rel.* Thompson v. Dye,[47] when the prosecutor's motive not to call the officer was neutral in basis, the court focused on the ultimate disadvantage to the accused at trial instead of the existence of an injurious intent to suppress. The language employed in these decisions was that of due process and fairness and would color the sparse holding in *Brady* by embodying the policy reasons put forward in the criminal discovery debate.[48]

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process, in short, means fair play." *Id.* at 388, *relying on* Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938). The court felt that it made no difference that the perjury was unknown until after trial.

42. 86 F. Supp. at 387.

43. United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952). Petitioner was convicted under a felony-murder statute but the fatal bullet was fired from a police officer's service revolver during a shoot-out following the robbery. A writ of habeas corpus was granted because of the denial of due process.

44. United States *ex. rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955) (habeas corpus relief was available since suppressed testimony negated prosecution theory of premeditated murder).

45. *Id.* at 768.

46. "Clearly the relevancy and weight of the heretofore undisclosed evidence of the arresting officers . . . was for the jury." *Id.* at 767. "The jury might not have been impressed by the supressed evidence and could still have imposed the death penalty on Almeida but it cannot be assumed that the jury would have done so." 195 F.2d at 820. *Cf.* Napue v. Illinois, 360 U.S. 264 (1959) (Chief Justice Warren's majority opinion commented on the interplay of the evidence and the jury). *See also* United States v. Agurs, 427 U.S. 97, 117 (1976) (Marshall, J., dissenting).

47. 221 F.2d 763 (3d Cir. 1955).

48. It is interesting to note that *Brady* cited *Baldi* and *Dye* as correctly stating the constitutional rule of due process. 373 U.S. at 86. *See also* 221 F.2d at 769 (Hastie, J., concurring):

> [T]his is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule can not be devised. . . . [I]t is

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In *Brady* itself, the defendant was found guilty of first degree murder, the killing having occurred during an armed robbery.[49] To avoid the death sentence, Brady testified that his accomplice had committed the actual killing. The accomplice had not yet been tried so Brady's attorney sought from the government any statements by the accomplice. The attorney received several such statements but did not receive one in which the accomplice admitted the killing. The Supreme Court held that this amounted to a denial of due process regardless of prosecutorial motive where it appeared that the failure to send the statement was due to negligence and not purpose.[50]

The federal courts began to grapple with the interpretation of the *Brady* rule as the definition of materiality and the conduct of the defense[51] became major points of contention. *United States ex rel. Meers v. Wilkins*[52] concerned the suppression of the affidavits of two eyewitnesses to a robbery wherein the witnesses did not identify the petitioner as the perpetrator of the crime. The Second Circuit Court of Appeals believed that the failure of the defense counsel to request the evidence did not preclude disclosure on the part of the government. The test was one of fundamental fairness given all the circumstances of the case.[53] *Levin v. Katzenbach*[54] dealt with the prosecution's negligent suppression of testimony which would have contradicted other government witnesses in a conspiracy trial. Concluding that a criminal trial was not a "game of wits"[55] predicated upon the cleverness or available resources of opposing counsel, the District of Columbia Circuit Court of Appeals remanded for a hearing on the suppressed evidence because the diligence of defense

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not every case in which the prosecution must reveal the availability of testimony inconsistent with the government's contentions. But in special circumstances such nondisclosure may, and here it certainly does, amount to fundamental unfairness in the trial of a criminal case.

49. 373 U.S. at 84.

50. *Id.* at 87. The Court further held that under Maryland law Brady was entitled to a new trial only as to the question of punishment. *Id.* at 90.

51. "Conduct of the defense" may be interpreted as including the diligence of the defense counsel in seeking favorable evidence, the motion for requesting favorable evidence in the possession of the prosecution, and the timing of the motion. For a discussion of timing of the motion, see generally Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 117-120 (1972).

52. 326 F.2d 135 (2d Cir. 1964).

53. *Id.* at 138. *See also* Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963) (failure of District Attorney to inform defense of psychiatric tests proving incompetency of accused amounted to fundamental unfairness and denial of due process).

54. 363 F.2d 287 (D.C. Cir. 1966).

55. *Id.* at 291.

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counsel was not determinative.[56] A case summarizing both the request and materiality aspects of *Brady* was *United States v. Hibler*,[57] in which the prosecutor failed to disclose an officer's testimony that corroborated the defendant's explanation as to his after-the-fact involvement with a car used earlier that day in a mail robbery. Announcing a "duty of candor," the Ninth Circuit Court of Appeals held:

> The test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial. That defense counsel did not specifically request the information, that a "diligent" defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process cannot be denied by failure to disclose alone . . . .
>
> . . . .
>
> Thus Hibler is entitled to reversal if the government failed to disclose evidence which, in the context of this particular case, might have led the jury to entertain a reasonable doubt about his guilt.[58]

The Supreme Court itself began to back away from *Brady* in a series of decisions[59] culminating in *United States v. Agurs*.[60] In holding that the *Brady* rule would be applicable in three situations, the *Agurs* decision seemed to rely heavily on the analysis by Judge Friendly in *United States v. Keogh*.[61] The first situation involves undisclosed evidence of which the prosecutor has actual or constructive knowledge and which in-

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56. *Id.* at 289. *See also* Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968) (defense lawyer cannot be expected to know testimony of witness subpoenaed but not called by the state).

57. 463 F.2d 455 (9th Cir. 1972).

58. *Id.* at 459-60 (citations omitted). *But see* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (defense request acts as an important indication of what is material and puts the prosecution on notice thereof).

59. The highwater mark of *Brady* was Giles v. Maryland, 386 U.S. 66 (1967), wherein the Supreme Court remanded for retrial based upon suppressed evidence that tended to impeach the credibility of the prosecutrix in a rape case. The plurality declined to define materiality or extend the duty to disclose to all evidence admissible and useful to the defense; a concurring opinion by Justice Fortas would have extended the duty to inadmissible evidence. But in Moore v. Illinois, 408 U.S. 786 (1972), the Court held that suppressed evidence, which included an incorrect diagram of the scene of the robbery by one witness and a mistaken identification of defendant by another, was not material nor sufficient to overcome the conviction given the weight of the rest of the evidence. Although not defining materiality, the Court foreshadowed *Agurs* by stating there is no constitutional requirement that the prosecution disclose all investigatory work.

60. 427 U.S. 97 (1976).

61. 391 F.2d 138 (2d Cir. 1968).

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dicates the use of perjury in the government's case.[62] Fundamental unfairness is manifest and the conviction must be set aside if there is *any* reasonable likelihood that the perjury would have affected the judgment of the jury. The second situation, illustrated by *Brady* itself, is characterized by a pretrial request for specific evidence;[63] such evidence is material if it *might* have affected the outcome of the trial. The third situation arises when no request for material is made or when only a general request for all "*Brady* material" is proffered.[64] This category is best illustrated by the facts in *Agurs*. In *Agurs*, the petitioner was convicted of second degree murder after a late-night interlude ended in the stabbing death of her male companion. Petitioner argued self-defense and her counsel made no request for evidence in possession of the government. After the conviction, facts surrounding the dead man's prior criminal record and violent proclivities came to light. The Court held that materiality in such a situation was defined in terms of "the justice of the finding of guilt."[65] Such a definition is consistent with, as one commentator has stated, the Burger Court's concern with factual guilt as opposed to legal guilt.[66]

The *Agurs* standard of fairness seems to be predicated upon an outcome determinative test[67] rather than on the ability to prepare for trial.[68] The question becomes: would the suppressed evidence have created a reasonable doubt as to the finding of guilt? In effect, the appeals judge making this determination sits in *de novo* review of the facts of the case. The dissent by Justice Marshall criticized this method as an invasion of the province of the jury.[69] While not citing *Chapman v. California*,[70] the

62. 427 U.S. at 103.

63. *Id.* at 104.

64. *Id.* at 107. The Court equated a general request with no request at all.

65. *Id.* at 112.

66. *See* Note, *Toward a Constitutional Right*, *supra* note 20, at 850-52. Broadly speaking, factual guilt is concerned with whether or not the defendant actually committed the acts constituting the crime while legal guilt examines procedural regularity and official propriety as well as the probability of factual guilt. *Cf.* Jackson v. Virginia, 443 U.S. 307 (1979) which stated that relevant inquiry in a federal court habeas corpus proceeding is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Employing this standard, the Court affirmed petitioner's conviction since there was no question that the petitioner had fatally shot the victim and a trier of fact could have found the specific intent necessary for a murder conviction.

67. 14 AM. CRIM. L. REV. 319, 330 n.76 (1976).

68. *Agurs* offers its rebuttal to the ability to prepare for trial policy: "[T]hat standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's case would always be useful in planning the defense." 427 U.S. at 112 n.20.

69. *Id.* at 117 (Marshall, J., dissenting). *But cf.* Jackson v. Virginia, 443 U.S. 307 (1979)

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Agurs decision seems to adopt the same harmless error perspective explained in *Chapman* in that, if the prosecutor's suppressed evidence would not have made any difference, then it is not material and constitutional error has not occurred.[71]

It is the contention of commentators critical of *Agurs* that the *Brady* policy of pretrial harm was incorrectly overlooked.[72] The fact that much evidence is neutral on its face[73] and must be developed in a trial setting[74] was glossed over by *Agurs*. In addition, the role of the jury in evaluating the suppressed evidence in conjunction with other facts of the case was downplayed.[75] The practical effect of *Agurs* is that general defense re-

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(Stevens, J., concurring):

> According to the Court, the Constitution now prohibits the criminal conviction of any person—including, apparently, a person against whom the facts have already been found beyond a reasonable doubt by a jury, a trial judge, and one or more levels of state appellate judges—except upon proof sufficient to convince a *federal judge* that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Id. at 326-27. It is hard to square Justice Stevens' opinion for the court in *Agurs* with his *Jackson* concurrence: the former seeks to expand the reviewing powers of the court while the latter would limit it. Perhaps, the best explanation is Justice Stevens' concern with the federal court caseload. Such caseload would potentially be increased by *Jackson* but not *Agurs* since implementation of *Agurs* would occur primarily in state courts.

70. 386 U.S. 18 (1966) (error, to be harmless, must not have contributed to conviction).

71. 427 U.S. at 112-13. One district court, however has volunteered a pertinent assessment of the *Agurs* decision: a balancing between the specificity of the request and the materiality of the evidence. In United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978), the court reasoned:

> Implicit in this focus is the idea that the prosecutorial duty to disclose must be balanced against defendant's right to a fair trial. As the information becomes more important or as the degree of prosecutorial notice of it increases, the duty to disclose broadens. Conversely, this balance tips most acutely in the favor of the prosecution when the evidence does not demonstrate perjured testimony and when the prosecutor is not put on notice of it either by a defense request or actual knowledge.

Id. at 1227. *Cf.* United States *ex rel.* Marzano v. Gingler, 574 F.2d 730 (3d Cir. 1978) requiring a balancing between the evidence presented and the evidence suppressed:

> In some instances, relatively minor facts that are withheld from a defendant may be enough to justify vacating a conviction, if the undisclosed information directly casts doubt on the evidence presented to the jury. . . . On the other hand, unrevealed evidence which by itself might seem more exculpatory than that justifying a new trial in another case may nevertheless not be considered material in a case where other evidence before the jury removes any doubts about the question of guilt.

Id. at 736 (citations and footnotes omitted).

72. *See supra* note 67, at 330.

73. *See* Note, *The Prosecutor's Constitutional Duty*, *supra* note 31, at 147.

74. *See supra* note 67, at 331.

75. *See* United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966). The standard for materiality formulated by the *Agurs*

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quests for "all *Brady* material" (the third *Agurs* situation) will be denied since such denial does not amount to suppression.[76] To avoid the third situation and a strict test of materiality, the defense must make a specific request for evidence so as to fit within the second *Agurs* situation and a less strict standard of materiality.[77]

Since *Agurs*, courts have attempted to fit cases into one of the three enumerated situations but have encountered new areas of controversy aside from the three situations. In *United States v. McCrane*,[78] the Third Circuit Court of Appeals implied that the government might have a duty to ask for a clarification or narrowing of any defense request.[79] *McCrane* thus created a "saving" doctrine in that general requests could be transformed into specific ones requiring disclosure of evidence in the prosecution's possession. Determining, under the facts of the case, that the request made had not been general, the decision stated that the language employed by the defense in making the request, the government's opportunity to clarify the request at a hearing, and a warning by the pretrial judge admonishing the government to deliver favorable evidence "all require that the request [in this case] be judged by *Agurs'* specific request test."[80]

A second area of controversy concerns distinguishing between suppressed evidence pertinent to the merits of the defense and evidence used for impeachment purposes.[81] The Fifth Circuit Court of Appeals, in *Garrison v. Maggio*,[82] has created a more stringent standard of materiality in the impeachment cases, "one requiring petitioner to demonstrate that the

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dissent was that "[i]f there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside." 427 U.S. at 119 (1976). *See also* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

76. United States v. DiCarlo, 575 F.2d 952 (1st Cir. 1978); United States v. Lasky, 548 F.2d 835 (9th Cir. 1977); United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978).

77. *See* Comment, *Materiality and Defense Requests*, *supra* note 35, at 451. As a matter of course, the mind set of the prosecution is to gather evidence that is incriminating. This results in exculpatory evidence being unintentionally overlooked. *Cf.* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (requests from defense counsel flag prosecutor as to what is material).

78. 547 F.2d 204 (3d Cir. 1976). An earlier decision, usually referred to as *McCrane One*, 527 F.2d 906 (3d Cir. 1975), had been vacated by the Supreme Court, 427 U.S. 909 (1976), and remanded for reconsideration in light of *Agurs*.

79. 547 F.2d at 208.

80. *Id. Contra*, United States v. DiCarlo, 575 F.2d 952 (1st Cir. 1978); United States v. Hearst, 435 F. Supp. 29 (N.D. Cal. 1977).

81. *See generally* Annot., 7 A.L.R.3d 181 (1966). However, language in *Agurs*, especially in the third situation, deals with favorable evidence that is only exculpatory.

82. 540 F.2d 1271 (5th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977).

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new evidence probably would have resulted in an acquittal."[83] Only when this standard is met will a new trial be granted by the fifth circuit because of nondisclosure of impeachment evidence.[84]

Finally, some dispute has arisen over the suppression of evidence in plea bargaining before trial. Suppression of evidence in a plea bargaining situation is more vulnerable to abuse than other situations and leaves the accused particularly defenseless. The court in *Fambo v. Smith*[85] held:

> In order to maintain the integrity of the plea bargaining process and to assure that a guilty plea entered by a defendant is done so voluntarily, knowingly and intelligently, a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case.[86]

IV. Virginia and Fourth Circuit Decisions

During the post-*Brady* era, the Fourth Circuit Court of Appeals distinguished itself as a liberal interpreter of the *Brady* rule. In the case of *Barbee v. Warden*,[87] the petitioner was convicted of shooting a police officer, but fingerprint and ballistics reports, showing that petitioner's gun was not used in the assault and his fingerprints were not on the assailant's car, were suppressed. The court dismissed the argument as to the diligence of defense counsel in uncovering favorable evidence and stated:

> In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel. . . . Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor.[88]

The Fourth Circuit later fashioned its own test of materiality by treating

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83. *Id.* at 1274.

84. *Id. But see* Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

85. 433 F. Supp. 590 (W.D.N.Y. 1977).

86. *Id.* at 598. The flavor of this case is distinctly that of the earlier suppression cases in focusing on the ethics of the prosecutor. In fact, the Supreme Court has exhibited a long-standing concern with prosecutorial ethics. *See* Santobello v. New York, 404 U.S. 257 (1971) (holding that the prosecutor's plea bargain promise must be kept); Berger v. United States, 295 U.S. 78 (1935) (holding that a prosecutor has a twofold aim—the guilty shall not escape nor the innocent suffer). *But see* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (due process was not violated when a prosecutor threatened during plea negotiations to reindict).

87. 331 F.2d 842 (4th Cir. 1964).

88. *Id.* at 846.

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favorable evidence as material if there was "substantial likelihood that it would have affected the result if known at the trial. . . ."[89] Since *Agurs*, the Fourth Circuit has decided two suppression cases that were distinguishable from *Agurs* in that they concerned promises of leniency to the witnesses in exchange for their testimony.[90]

The leading Virginia Supreme Court case on suppression of evidence is *Stover v. Commonwealth*[91] which falls squarely within the *Brady* rule. Petitioner was convicted of second degree murder arising out of a car chase and subsequent knife fight. His attorney asked for statements of witnesses but was told there were none. However, the prosecutor did have in his files the police report of a prior violent incident involving the victims but felt it was irrelevant or immaterial. Even though the prosecutor's conduct was not improper, the Virginia Supreme Court reversed and remanded for a new trial because by "passive or inadvertant nondisclosure Stover was denied the opportunity to show that he was set upon by persons who had recently committed acts of violence. . . ."[92]

Three years later, the court in *Bellfield v. Commonwealth*[93] refused to allow the defendant to discover, for impeachment purposes, statements made by prosecution witnesses after they had testified. The petitioner argued that the Virginia Supreme Court should adopt a version of the *Jencks* rule to allow such discovery.[94] However, since the *Stover* decision,

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89. Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966). The suppressed evidence in this case was the victim's prior conviction for perjury. The victim's name had been misspelled, thereby concealing his past record. This error, though unintentional, led to a reversal of the conviction given the importance of a fair trial for the accused. *See also* Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967) (prosecution suppressed report showing slivers of glass in the victim's shirt tending to corroborate allegations that he was climbing through a window when shot).

90. United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976). The implication of these cases is that the Fourth Circuit rejects the Fifth Circuit's higher standard of materiality for impeachment evidence. This is confirmed by the recent decision, Sennett v. Sheriff of Fairfax County, 608 F.2d 537 (4th Cir. 1979), which held that the prosecutor's refusal to honor a specific defense request for the names of two witnesses that would discredit a government witness was reversible error. "This is not a case where impeachment evidence would be merely cumulative or have no significant effect on the witness' credibility." *Id.* at 538. *See also* United States v. Figurski, 545 F.2d 389 (4th Cir. 1976) (evidence to discredit a government witness falls within the *Brady* rule).

91. 211 Va. 789, 180 S.E.2d 504 (1971).

92. *Id.* at 794-96, 180 S.E.2d at 509. *But see* the earlier case of Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939) (tending to disallow pretrial criminal discovery).

93. 215 Va. 303, 208 S.E.2d 771 (1974).

94. The Jencks Act, not previously discussed, is found at 18 U.S.C. § 3500 (1976) and prohibits pretrial statements of government witnesses. However, at trial and after testifying, witnesses' statements can be produced upon motion by the defense. The act was passed in

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the General Assembly had enacted a new Rule of Court which provided for limited pretrial discovery but exempted discovery of just such statements.[95] Moreover, the court distinguished *Stover* and *Bellfield* on the grounds that *Bellfield* did not represent suppression of favorable exculpatory evidence known to the Commonwealth. It was felt that fundamental fairness principles should be also applicable to the government's case by discouraging fishing expeditions by defense counsel and by maintaining the confidence between the citizenry and prosecuting officers.[96]

Recently, the Virginia Supreme Court had the opportunity to interpret *Agurs* in the case of *Dozier v. Commonwealth*.[97] Petitioner was convicted of the rape and abduction of a runaway, but the girl's original statement

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response to Jencks v. United States, 353 U.S. 657 (1957) which had allowed pretrial discovery of statements. *See generally* 50 VA. L. REV. 535 (1964). Federal criminal discovery is now governed by Rule 16 of the Federal Rules of Criminal Procedure, permitting some pretrial discovery. FED. R. CR. PRO. 16 is codified at Title 18, Appendix of the United States Code.

95. VA. SUP. CT. R. 3A:14(b). The rule states:

> (b) *Discovery by the Accused.*
>
> (1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.
>
> (2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. *This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth* or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this rule.

(Emphasis added).

96. Bellfield v. Commonwealth, 215 Va. at 307, 208 S.E.2d at 774. *See* Lowe v. Commonwealth, 218 Va. 670, 239 S.E.2d 112 (1977) (holding that the Commonwealth need not supply the names and addresses of witnesses). Among other policy reasons given for the *Bellfield* holding by the Virginia Supreme Court was the protection of victims of the crime and public-spirited citizens offering testimony. *Cf.* Louisell, *supra* note 22, at 100 (discrediting the intimidation factor).

97. 219 Va. 1113, 253 S.E.2d 655 (1979).

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to police did not mention rape and was fuzzy as to the details of the abduction. During trial, the defense specifically requested the statement but was never given a copy. The court reversed and remanded holding that the "exculpatory value" of the extra-judicial statement was "its utility for discrediting her as a witness."[98] The court placed *Dozier* within the second *Agurs* category and interpreted *Agurs* as requiring three standards of constitutional materiality, thereby indicating how it might deal with future suppression of evidence cases.[99]

V. *Brady* AND THE POLICE INVESTIGATION

The last few years have seen a burst of legal discussion propounding a constitutional right to present a defense.[100] Ancillary to this would be the right to an adequate police investigation or, at least, the right of the defense to have access to police reports and investigative aids.[101] Either right can be grounded in both the sixth amendment right to counsel[102] and the fifth amendment due process requirement as considered in *Brady*.[103] However, fundamental to the reasoning that *Brady* mandates an adequate or accessible investigation is the theory behind the *Brady* lineage: inequality in resources hampers the defense in trial preparation.[104] It is problematic whether the Supreme Court would accept this theory at this time;[105] so any expansion of *Brady* rights must be ad-

98. *Id.* at 1118, 253 S.E.2d at 658. The court seems to have distinguished *Bellfield* without mentioning it because the witness's pretrial statements were found to be exculpatory despite their use for impeachment purposes. The court also seems to reject the *Garrison v. Maggio* rationale of a higher standard of materiality for impeachment evidence. *See* notes 82-84 *supra* and accompanying text.

99. In discussing the materiality standards, the court said: "From a defendant's viewpoint, the least onerous is the 'might have affected' standard in the *Brady* situation, followed progressively by the 'reasonable likelihood' standard in the *Mooney* situation and the 'reasonable doubt' standard in the *Agurs* situation." 219 Va. at 1116-17, 253 S.E.2d at 657. The court refused to concern itself with the reasonable doubt standard although mentioning the dissent in *Agurs* as questioning its viability.

100. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976); Comment, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970) [hereinafter cited as Comment, *The Indigent's Right*].

101. *See* United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Note, *Toward a Constitutional Right*, *supra* note 20; Note, *The Constitutional Mandate of Effective Assistance of Counsel: The Duty to Investigate*, 6 HOFSTRA L. REV. 245 (1977).

102. *See* Nakell, *supra* note 4, at 462-69; Note, *Toward a Constitutional Right*, *supra* note 20, at 843-47.

103. *See* Nakell, *supra* note 4, at 451-62; Note, *Toward a Constitutional Right*, *supra* note 20, at 848-50.

104. *See* Brennan, *supra* note 29.

105. *See* United States v. Agurs, 427 U.S. at 112 n.20.

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dressed within the framework of *Agurs:* that a specific request for a particular avenue of investigation is necessary rather than a general request which would fall within the third *Agurs* situation and probably fail to meet materiality standards.[106]

An underlying assumption to extending *Brady* to police investigations is that police action is synonomous with the prosecutorial function.[107] However, the crucial leap is in accepting the failure to investigate as amounting to the suppression of evidence, whether the failure is negligent or willful.[108] A case which made the crucial leap and presented facts clarifying such an extension of *Brady* was *Bowen v. Eyman.*[109] Petitioner, an indigent, was convicted of rape and robbery. Prior to trial, he moved for a court-appointed expert to compare seminal fluid taken from the victim to his own blood in order to effect a typing and, if the two did not match, to negate his guilt.[110] The district court held that "fundamental fairness" required such an expert as a matter of constitutional right and the state's "refusal to run the test is tantamount to a suppression of evidence such as there was in *Brady v. Maryland.* . . ."[111]

Five months earlier, the Ninth Circuit Court of Appeals, by implication, also raised the possibility of due process deprivation as a result of inadequate police investigation. In *Peoples v. Hocker,*[112] the petitioner was convicted of murder but contended that the victim committed suicide. He argued that if the police had conducted fingerprint, paraffin and ballistics tests, he would have been exculpated. Nothing on the record indicated whether the tests were or were not conducted, but the court felt

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106. *See* notes 76-77 *supra* and accompanying text.

107. *See* Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979) (holding a police detective's knowing concealment of a witness amounted to state suppression). "We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team." *Id.* at 69. *See also* Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966). *Contra,* Bowles v. Texas, 366 F.2d 734 (5th Cir. 1966); People v. Blankenship, 171 Cal. App. 2d 66, 340 P.2d 282 (1959).

108. *See* Note, *Toward a Constitutional Right, supra* note 20, at 856-59, dealing with cases of lost evidence and lost informants which are closely analogous to the failure to investigate situation. For a discussion of lost evidence cases, see generally United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); for a discussion of lost informants cases, see generally Roviaro v. United States, 353 U.S. 53 (1957).

109. 324 F. Supp. 339 (D. Ariz. 1970).

110. As to identifying blood type of sperm, *see* A. MOENSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES § 6.14 (2d ed. 1978).

111. Bowen v. Eyman, 324 F. Supp. at 340.

112. 423 F.2d 960 (9th Cir. 1970).

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"better investigation would have been helpful to the jury."[113] The court declined to establish criteria as to when "a certain quantum of police investigation constitutes due process" and concluded "the investigation was not so poor as to amount to a deprivation of due process, much less a suppression of evidence. . . ."[114] The implication was that a poor investigation might be violative of due process.

The District Court of Northern California seized on this language in *Adams v. Stone*.[115] Petitioner alleged that when he was booked for first degree murder he requested and was denied a blood or sobriety test and that the administering of such tests was standard procedure. The court felt that "[t]he line between intentional suppression of evidence or the failure to preserve evidence and the intentional failure to make standard tests would not seem to be a substantial one."[116] The tests might have established intoxication leading to a diminished capacity defense and reducing the murder conviction to voluntary manslaughter. Declining to review police procedure, the court issued an order to show cause why a habeas writ should not be granted.[117]

The recent case of *Lewinski v. Ristaino*[118] dismissed an inadequate investigation argument by distinguishing *Adams* and *Bowen*. Petitioner was convicted of the murder of a woman after sexual intercourse in his friend's apartment. The day after his arrest, upon counsel's request, the medical examiner extracted a test sample of sperm from the victim but, due to its mixture with embalming fluid, a blood type was impossible. The District Court of Massachusetts found no negligence on the part of the police and believed the typing of the sperm would not have been dispositive of guilt.[119] The court held:

> Assuming *arguendo* that the police investigation was negligent, there is no authority to indicate that police negligence in investigation, without more,

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113. *Id.* at 964.
114. *Id.*
115. 378 F. Supp. 315, 317 n.1 (N.D. Cal. 1974).
116. *Id.* at 317.
117. *Id.*
118. 448 F. Supp. 690 (D. Mass. 1978).
119. *Id.* at 696 n.11. The typing of the sperm with petitioner's own blood would have established: (1) he did *not* have intercourse with the victim, if no match or (2) the victim had intercourse with petitioner or someone having the same blood type, if there was a match. These results would either impeach or corroborate Smith's testimony that the two had had sexual relations before the homicide. The court felt that, given the weight of the rest of the evidence, Smith's testimony was inconsequential. *But see* Bowen v. Eyman, 324 F. Supp. 339 (D. Ariz. 1970), where the typing test would have gone to the heart of the rape indictment.

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> is equivalent to a denial of due process. . . . The cases on which petitioner relies [*Adams* and *Bowen*] have two elements not present here. First, the police or prosecution [in this case] did not refuse to conduct the tests upon timely request or motion of the petitioner. Second, no evidence was presented that standard police procedures were violated.[120]

Having considered these cases, three standards can be drawn in order to establish a *Brady* argument for inadequate investigation being tantamount to suppression in two different fact situations. In situation one, police conduct can be classified as willful suppression of evidence by refusal to investigate; situation two would involve negligent investigation. The three standards are as follows: (1) the duty—situation one where the accused or his counsel specifically requests a test to be run;[121] situation two where, in absence of a request, standard police procedure of conducting such tests under the circumstances is not followed;[122] (2) the breach—situation one where, after a request, there is a refusal to run the test;[123] situation two where standard procedure is not followed;[124] (3) materiality requirement—situation one where, if a specific request is made, the test must be material as to guilt[125] or punishment;[126] situation two where no materiality is required if the test is standard procedure.[127]

At this point, it must be noted that inadequate investigation, by necessity, deals with police conduct in areas of scientific testing;[128] other investigation not pursued by the police, such as interviewing of witnesses, might not be viewed as being suppression of evidence. The reason for this centers on the previously cited argument that there is a need for diligence on the part of defense counsel.[129] It is obvious that in a situation of negligent or wilful refusal to investigate, even the most diligent defense coun-

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120. 448 F. Supp. at 696-97.

121. Adams v. Stone, 378 F. Supp. 315 (N.D. Cal. 1974); Bowen v. Eyman, 324 F. Supp. 339 (D. Ariz. 1970).

122. Peoples v. Hocker, 423 F.2d 960 (9th Cir. 1970); Lewinski v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978); Adams v. Stone, 378 F. Supp. 315 (N.D. Cal. 1974).

123. 378 F. Supp. 315; 324 F. Supp. 339.

124. 378 F. Supp. 315.

125. 324 F. Supp. 339.

126. 378 F. Supp. 315.

127. *Id.*

128. The above four cases, *Adams, Bowen, Lewinski,* and *Hocker,* specifically dealt with scientific evidence in the form of sperm tests, sobriety tests, ballastics tests, paraffin tests and fingerprint identification. *See generally* MOENSSENS & INBAU, *supra* note 110.

129. *But see* United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955), all holding no need for diligence.

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sel would not have access to physical evidence in police custody or laboratory resources to conduct tests, whereas counsel could gather and interview witnesses. The original *Brady* rationale of inequality of resources becomes crucial from a due process standpoint, especially with regard to the indigent defendant.[130] How can a fair trial be possible for one who does not have the ability to garner independent scientific analysis of potentially damning evidence? An onus must be placed on the police or other investigatory bodies to conduct such tests in their capacity as public officers in order to arrive at true and just criminal proceedings, perhaps as an inherent duty[131] but, at least, as a duty upon request.

VI. Access to State Crime Laboratories

More than passing notice must logically be given to access to state crime laboratory facilities since it has been argued that scientific testing will be the major area of controversy in adequate investigation cases. Virginia Code section 2.1-426 transfers the Division of Consolidated Laboratory Services to the Department of General Service.[132] Further, section 2.1-429.1 establishes a Bureau of Forensic Science within the Division to provide forensic laboratory services upon request to state police, the Commonwealth's Attorney, local chief of police or sheriff, local fire de-

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130. *See* Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974) holding:

> The principles steadfastly announced in the Supreme Court decisions reviewed above require us to hold that the effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to insure effective preparation of their defense by their attorneys.

Id. at 1351 (citations omitted). *But cf.* Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979) (holding no requirement that the state provide funds for an independent psychiatric examination of the accused). *See generally* 18 U.S.C. § 3006(A)(e) (1976) (funding investigative assistance to indigents in federal prosecutions); Comment, *The Indigent's Right, supra* note 100, at 635.

The Fifth Circuit Court of Appeals would extend this investigation to all criminal defendants. In Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975), the court allowed pretrial examination of the murder weapon following a defense request and held:

> The question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense. . . . Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Id. at 746. Recently the Fifth Circuit has emphasized that the evidence must be both "critical" and "subject to varying expert opinion" for due process to mandate an independent investigation. Gray v. Rowley, 604 F.2d 382, 383 (5th Cir. 1979) (no need to inspect clothes of rape victim in light of other overwhelming evidence).

131. Note, *Toward a Constitutional Right, supra* note 20, at 868-71.

132. Va. Code Ann. § 2.1-426 (Repl. Vol. 1979).

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partment, any state agency in a criminal matter, and any federal investigatory agency.[133]

The Virginia Code in section 2.1-433 also makes provision for the accused person or his attorney to have the results of a scientific investigation.[134] This section also allows the person accused or his attorney to request in the court in which charges are pending a scientific investigation to be conducted by the Division as long as he believes, in good faith, such investigation is relevant. The motion is heard ex parte, and the prosecution may request the results of the investigation for the Commonwealth's inspection.

This progressive statute creates a prophylactic remedy to inadequate police investigation as to scientific evidence;[135] it is both a rule of discovery and of further investigation. The question may be raised whether failure to avail oneself of the benefits of the statute constitutes a defendant's waiver of a defense of negligent police investigation in future proceedings. However, standing alone, the statute joins the doctrine of open files and *in camera* inspections as leading solutions to the criminal discovery problem.[136]

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133. *Id.* at § 2.1-429.1.

134. *Id.* at § 2.1-433 which reads as follows:

> **Rights of accused person or his attorney to results of investigation or to investigation.**—Upon the request of any person accused of a crime, or upon the request of such accused person's attorney, the Division shall furnish to such accused or his attorney the results of any investigation which has been conducted by it and which is related in any way to a crime for which such person is accused. In any case in which an attorney of record for a person accused of violation of any criminal law of the Commonwealth, or such person, may desire such scientific investigation, he shall, by motion filed before the court in which said charge is pending, certify that in good faith he believes that such scientific investigation may be relevant to such criminal charge. The motion shall be heard ex parte as soon as practicable and such court shall, after hearing upon such motion and being satisfied as to the correctness of such certification, order that the same be performed by the Division of Consolidated Laboratory Services and shall prescribe in its order the method of custody, transfer, and return of evidence submitted for scientific investigation. Upon the request of the Commonwealth's attorney of the jurisdiction in which the charge is pending, he shall be furnished the results of such scientific investigation.

135. *Cf.* Note, *Toward a Constitutional Right*, *supra* note 20 (which argues that dismissal of charges is an appropriate post-conviction remedy for inadequate investigation).

136. In the open file doctrine, the defense would have complete access to the prosecutor's files, thereby unburdening both courts and lawyers in lengthy pretrial discovery. The inequality of resources argument would be defused while the policy that the prosecutor is bound to arrive at the truth would be served. The doctrine of *in camera* inspection allows the court to view potentially exculpatory evidence, after a motion to decide if it is material, without harm to the prosecution if it is not. *See generally*, Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972); Note, *Implementing*

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Some problem arises in section 2.1-434 which prohibits the use of Division laboratory facilities by independent experts employed by the defense in order to examine materials previously tested by the Division.[137] Such a prohibition appears to be a serious encroachment on the opportunity to present rebuttal testimony to Division findings and draws into question whether the state crime laboratories are to be pro-law enforcement in their orientation or neutral in their undertakings. The statute also is contrary to the *Brady* spirit of equalizing resources between the defendant and the prosecution, especially considering the fact that the crime lab is probably the best equipped facility in the state.[138]

VII. Conclusion

Brady held that the prosecution's suppression of any evidence which was material to the guilt or punishment of the defendant was, after a request for such evidence, a violation of due process. In *Bowen*, *Brady* was extended so that a refusal to run tests requested by the accused was tantamount to a suppression of evidence. The *Brady* rationale that a fair trial is impossible due to the inequality of resources between the government and the defense[139] may lead to further judicial extension by way of holding negligent investigation or willful refusal to investigate as being suppression of evidence. In the alternative, statutory enlargement of in-

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Brady v. Maryland: An Argument for a Pretrial Open File Policy, 43 U. Cin. L. Rev. 889 (1974).

137. Va. Code Ann. § 2.1-434 (Repl. Vol. 1979) states:

> **Reexamination by independent experts.**—Independent experts employed by an attorney of record for a person accused of violation of any criminal law of the Commonwealth, or such person, for the purpose of reexamination of materials previously examined in any laboratory of the Division of Consolidated Laboratory Services shall conduct their analysis or examinations independent of the facilities, equipment or supplies of the Division.

138. As for other state crime laboratory statutes, *cf.* Cal. [Penal] Code § 11050.5(b) (West Supp. 1980) (use restricted to indigents only for purposes of conducting tests); Wis. Stat. Ann. § 165.79 (West Supp. 1980-81) (test results from state crime laboratories are privileged).

In cases of controlled substances, state crime laboratories may adopt reasonable regulations policing the substances that refuse independent analysis without depriving due process rights to an accused. *See* United States v. Williams, 613 F.2d 560 (5th Cir. 1980); United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979).

139. Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases*, 9 Crim. L. Bull. 325 (1973) holding:

> It is the disparity between the investigatory facilities which harms the defendant. Consequently, the real damage is done before trial or in the early stages of the litigation, and it is to that time period, rather than the highly speculative impact on the jury, that the court's attention should be addressed.

Id. at 332.

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vestigative opportunities can also be useful in raising criminal discovery to the highly-refined level of civil discovery, particularly by opening state crime labs to defendants and, thereby, facilitating scientific investigation and removing the traditional disadvantage placed on the defendant.

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